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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 221

J. CLYDE DEAN, DOING BUSINESS AS RED RIVER BARGE LINE, OWNER OF THE TUG DORIS DEAN,
Petitioner,

versus

BARGE TRANSPORT COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

L. J. BENCKENSTEIN,
GEORGE W. BROWN, JR.,
SELIM B. LEMLE.

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versus

BARGE TRANSPORT COMPANY.

PETITION FOR WRIT OF CERTIORARI.

J. Clyde Dean, doing business as Red River Barge Line, owner of the tug DORIS DEAN, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, entered on May 21, 1943.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT.

This is an admiralty proceeding growing out of a collision between the tug DORIS DEAN and her tow and the barge BUTTE.

The Diesel tug DORIS DEAN was descending the Calcasieu River in the nighttime, shoving ahead of her the barge DEAN 8, when she collided with an unlighted barge, the BUTTE, which was moored to the bank. The DORIS DEAN and her tow, barge DEAN 8, are both shallow draft vessels, the former drawing only 6′ of water (R. 89) and the latter about 3′ 6″ (R. 89). The Calcasieu River at the point of the accident is about 600′ wide and there is a 200′ steamship channel about the middle of the river (R. 101), but the DEAN and her tow, because of their shallow draft, did not have to navigate this channel, and on the night in question, which was hazy, the tug and her tow were proceeding down their left hand bank so that if the fog closed in suddenly, as was not unusual in that vicinity (R. 90), they would be in sight of land. The barge BUTTE was moored to the bank with her outboard side extending about 35′ out in the river, and the up-river outboard corner of the barge BUTTE was struck by the port forward corner of the barge DEAN 8. While visibiity was not good, the navigator of the DORIS DEAN testified that he was able to see for a quarter of a mile a light on an oil wharf just upstream from the barge BUTTE (R. 122), but that he didn't see the barge BUTTE because she had no light on her. (R. 166).

Barge Transport Company, as owner of the barge BUTTE, proceeded against the DORIS DEAN to recover

$1548 damages arising out of the collision, and J. Clyde Dean, doing business as Red River Barge Line, the owner of the tug DORIS DEAN and her tow, barge DEAN 8, cross-libelled, claiming $100 damage suffered by the barge DEAN 8 in the collision.

The District Court found for libellant and dismissed the cross-libel. Its findings of fact and conclusions of law will be found in the record, page 30 ff.

The United States Circuit Court of Appeals for the Fifth Circuit affirmed the decree of the District Court. Its opinion rendered May 21, 1943, not yet officially reported, will be found in the record at page 205 ff. An application for rehearing was filed (R. 209) and refused.

The Court of Appeals held the Diesel tug DORIS DEAN was at fault for proceeding down her own port bank of the Calcasieu River, citing in support thereof the case of *The Standella*, 108 F. (2d) 619, decided by that Court and in which it held a vessel at fault for proceeding on the left hand side of a narrow channel in violation of Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Sec. 1, 30 Stat. 101, 33 U. S. C. 210. We submit that in so holding the Court erred. This Act is not applicable to the Calcasieu River, the navigation thereof being governed by Section 4233 of the Revised Statutes of the United States, as amended, and by the rules and regulations supplementing these statutory rules, adopted by the Board of Supervising Inspectors of the United States pursuant to Section 4412 of the Revised Statutes of the United States, the Cal-

casieu River being one of those rivers which flow into the Gulf of Mexico, and all of such rivers being expressly excepted from the purview of the Inland Waters Rules.

We further submit that even if Article 25 of the Inland Waters Rules, known as the Narrow Channel Rule, were applicable to the waters in which the collision occurred, the rule does not apply to a shallow draft vessel such as the DORIS DEAN and her tow and does not apply to a collision between a vessel under way and a moored vessel.

We further submit that the Court erred in holding in effect that the fact that the DORIS DEAN with her tow kept to her own left hand side of the channel was a fault *per se* which rendered her liable for this collision, because the cause of the collision was the failure of the BUTTE to show a light, and the presence of the DORIS DEAN and her tow on their own left hand side of the channel was a condition, not the cause, of the collision with the BUTTE.

Finally, we submit that the Court erred in failing to hold that the admitted failure of the BUTTE to display a light was a statutory fault which caused or contributed to the collision between the DORIS DEAN and the BUTTE, and in failing to hold either that the BUTTE'S failure to display a light caused the collision and rendered the BUTTE solely responsible therefor, or, in the alternative, that it was a contributing cause of the collision, rendering the BUTTE equally liable therefor with the DORIS DEAN.

QUESTIONS PRESENTED TO THIS COURT.

Based on these errors, the questions presented are these:

First: Does Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Sec. 1, 30 Stat. 101, 33 U. S. C. 210, apply to the Calcasieu River? If it does not, then the DORIS DEAN was not guilty of a fault by proceeding with her tow down her own left hand bank of the River.

Second: If the Narrow Channel Rule is applicable to the Calcasieu River, then

(a) does the rule apply to a shallow draft vessel such as the DORIS DEAN, and

(b) does the rule apply to a collision between a moored vessel and one under way?

Third: Does the fact that a vessel is proceeding out of the proper channel *per se* render that vessel liable for a collision in the nighttime with an unlighted vessel which is required by statutory rule to show a light, and excuse that statutory fault of the offending vessel and deprive the moving vessel of any right to recover either whole or divided damages against the unlighted vessel?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The fundamental failure of the Circuit Court of Appeals for the Fifth Circuit to apply the proper rules to the navigation of the Calcasieu River has established a dangerous principle, and particularly dangerous at this

time because of the extraordinary and ever growing movement of oil and other war materials in that river and in the other inland waterways of the Gulf of Mexico subject to the same navigation rules and principles.

The error of the Court of Appeals in holding that in the Calcasieu River a shallow draft vessel may not navigate out of the channel established for the navigation of deep draft vessels and may not navigate on her own left hand side of the river is serious indeed, for if this rule be applied, proper, safe and expeditious navigation will be greatly hampered and impeded.

Of the very greatest importance to navigation interests is the question whether or not they may expect their vessels to navigate in the nighttime with the assurance that vessels moored in the intracoastal waterways of the Gulf of Mexico will be lighted, and the corollary rule whether or not they are obligated to light their own vessels when they moor them in these waterways.

It is also of great importance to correct the erroneous decision of the Court of Appeals holding that the mere fact that a vessel was proceeding on her own left hand side of the channel was a fault *per se* where she collided with a moored vessel. In other circuits it has been held that where a vessel proceeding on the left hand side of the channel came into collision with a stationary vessel, the fact that the moving vessel was on the left hand side of the channel was merely a condition and not the cause of the collision, and the contrary holding of the United States Circuit Court of Appeals for the Fifth Circuit is in con-

flict with two of the most recent decisions of the United States Circuit Courts of Appeal on the subject. *The Deutschland*, 90 F. (2d) 454, decided by the United States Circuit Court of Appeals for the Second Circuit, and *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167, decided by the United States Circuit Court of Appeals for the First Circuit.

Finally, it is of the greatest importance to have determined whether there is to be applied in the Fifth Circuit a rule that where one vessel is found at fault for a collision, another vessel which has committed a grave statutory fault which may have contributed to the collision, is to be excused without even having the fault determined or its connection with the collision examined into, in contraventon of the rule elsewhere of universal application, that where a vessel is guilty of a violation of a positive statutory rule, in order to exonerate herself from liability, she carries the burden of showing that such failure not only did not cause or contribute to the collision but that it could not have done so, established by Your Honors in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, and reannounced by you and applied repeatedly in *Lie v. San Francisco & Portland SS. Co.*, 243 U. S. 291; *Belden v. Chase*, 150 U. S. 674; *The Britannia*, 153 U. S. 130; *Richeleau Navigation Co. v. Boston Insurance Co.*, 136 U. S. 408, and *The Martello*, 143 U. S. 464. The United States Circuit Court of Appeals for the Fifth Circuit previously followed and only recently abandoned this rule. Among other cases decided by that Court we cite *Johnson v. United States*, 4 F. (2d) 102, decided in 1925, our reason for selecting this example of the Fifth Circuit's former acquiescence in the rule being that that case has many

points in common with the case at bar. That case involved a collision in the channel of the Mississippi River between a tug with two barges in tow and a schooner. The Court found the schooner at fault on grounds not pertinent to this discussion and also held the tug at fault for violating the narrow channel rule and for failing to show proper lights on the barges in her tow. There were displayed no green and red side lights on either barge and only one white light instead of two white lights on the rear barge, as required by the pertinent rule. The Court said:

> "There were no green and red side lights on either barge, and only one white light, instead of two, was on the rear barge, and the tug was in the center of the channel. The burden was on the appellee to show, not only that its violations of these rules probably did not contribute to the collision, but that they could not have done so. The Pennsylvania, 19 Wall. 125, 137, 22 L. Ed. 148; Belden v. Chase, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; The Martello, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637; The Britannia, 153 U. S. 130, 14 S. Ct. 795, 38 L. Ed. 660; Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 S. Ct. 270, 61 L. Ed. 726. If the barges had been equipped with proper lights, in all probability there would have been no collision."

The United States Circuit Court of Appeals for the Fifth Circuit first departed from this universal rule in the case of *The Standella*, 108 F. (2d) 619, decided in December of 1939. In that case the motor vessel STANDELLA was proceeding in Galveston Bay in a fog on the left hand side of a narrow channel, in violation of Article 25 of the Inland Waters Rules, which was there applicable, when she collided head on with another vessel, the ANDREW, pro-

ceeding in the opposite direction, which the STANDELLA claimed was guilty of fault for excessive speed in a fog and failing to stop. The Court held the STANDELLA solely at fault and excused the ANDREW for running too fast in a fog and failing to stop on the apparent theory that if the STANDELLA had not been on the wrong side of the channel she couldn't have hit the ANDREW regardless of the ANDREW'S fault. That is patently an application of the "but for" rule and a flagrant violation of the rule that where a vessel is guilty of a statutory fault which contributes to a collision, in order to exonerate herself, she must show not only that her fault did not cause the collision but it could not have done so, and marks a departure from the universal rule which had been theretofore applied by the Fifth Circuit Court of Appeals in a number of cases, including *Johnson v. United States*, supra.

Having departed from the universal rule and having been guilty of an error in that regard in the STANDELLA, the United States Circuit Court of Appeals for the Fifth Circuit now repeats that error in the case at bar by refusing to consider the liability of the BUTTE for her statutory fault in failing to display a light, and in failing to hold either that that fault caused the collision or at least contributed to it, and not assessing at least half damages against the BUTTE.

The decision of the United States Circuit Court of Appeals in this case is in conflict with its own prior jurisprudence in *Johnson v. Unted States*, supra, with the jurisprudence of the Supreme Court of the United States above cited, and also with the jurisprudence of other circuits, as

an example of which we cite *General Seafoods Corporation v. J. S. Packard Dredging Co.*, 120 F. (2d) 117, decided by the United States Circuit Court of Appeals for the First Circuit. Unless a writ of certiorari is granted by Your Honors and the conflict resolved by the correction of this patent error, there will result the perpetuation of the error in the jurisprudence of the Fifth Circuit.

In connection with this petition for writ of certiorari, petitioner is filing herewth a brief in support thereof, which it requests be considered a part of this petition.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

L. J. BENCKENSTEIN,
GEORGE W. BROWN, JR.,
SELIM B. LEMLE.

August, 1943.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

There was no opinion rendered by the District Court of the United States for the Eastern District of Texas. Its finding of fact and conclusions of law will be found in the record at page 30 ff. The opinion of the United States Circuit Court of Appeals for the 5th Circuit was rendered on May 21, 1943 and has not yet been officially reported, but will be found in the record at page 205 ff. A rehearing was refused on July 1, 1943.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, ch. 229, section 1, 43 Stat. 938, 28 U.S.C. 347(a).

III.

STATEMENT OF THE CASE.

This has been fully covered in the petition filed herein for certiorari, and in the interest of brevity is not repeated at this point. (See Ante, page 2).

IV.

SPECIFICATION OF ERRORS.

First.

The Court of Appeals erred in holding that the Diesel Tug DORIS DEAN was at fault for proceeding down her own port bank of the Calcasieu River in violation of Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Section 1, 30 Stat. 101, 33 U. S. C. 210. This Act is not applicable to the Calcasieu River, navigation thereof being governed by Section 4233 of the Revised Statutes of the United States, as amended, and by the rules and regulations supplementing the statutory rules adopted by the Board of Supervising Inspectors of the United States pursuant to Section 4412 of the Revised Statutes of the United States. The Calcasieu River is one of those rivers which flow into the Gulf of Mexico, all of such rivers being expressly excepted from the purview of the Inland Waters Rules. (Argument, post page 13).

Second.

The Court of Appeals erred in holding in effect that Rule 25 of the Inland Waters Rules, even if applicable, applied to a collision between a vessel under way and a moored vessel. (Argument, post page 17).

Third.

The Court of Appeals erred in holding in effect that Rule 25 of Inland Waters Rules, even if applicable, applied to a shallow draft vessel such as the DORIS DEAN. (Argument, post page 17).

Fourth.

The Court of Appeals erred in holding that the fact that the DORIS DEAN kept to her own left hand side of the channel was a fault *per se*, because the presence of the DORIS DEAN on her own left hand side of the channel was a condition, not a cause, of the collision with the BUTTE, and therefore the conduct of the DORIS DEAN in proceeding on the left hand side of the channel should be excused. (Argument, post page 18).

Fifth.

The Court of Appeals erred in failing to hold that the failure of the barge BUTTE to display a light was a statutory fault which caused the collision and rendered the barge BUTTE solely liable therefor, or, in the alternative, contributed to the collision, rendering the BUTTE equally liable therefor with the DORIS DEAN, and in the latter event dividing the damages between the two vessels. (Argument, post page 19).

ARGUMENT.

First Assignment of Error.

(Ante, page 12)

The Court of Appeals found that the DORIS DEAN was at fault for proceeding down her own left hand side of the Calcasieu River, apparently on the mistaken assumption that some rule of navigation, either statutory or promulgated by the Board of Supervising Inspectors, forbade such action. The Court appears to have been of the mistaken opinion that Rule 25 of what is commonly known as Inland Waters Rules, being a navigation rule

established by the Act of Congress of the United States of June 7, 1897 c. 4, Section 1, 30 Stat. 101, 33 U.S.C. 210, was applicable, because it cited in support of its holding the case of *The Standella*, 108 F. (2d) 619, previously decided by that Court, which interpreted and applied that rule. However, it is clear that that Act of Congress is by its terms inapplicable to the Calcasieu River. The preamble to that Act provides :

> "Whereas the provisions of chapter eight hundred and two of the laws of eighteen hundred and ninety, and the amendments thereto, adopting regulations for preventing collisions at sea, apply to all waters of the United States connected with the high seas navigable by seagoing vessels, except so far as the navigation of any harbor, river, or inland waters is regulated by special rules duly made by local authority; and
>
> Whereas it is desirable that the regulations relating to the navigation of all harbors, rivers, and inland waters of the United States, *except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and *rivers emptying into the Gulf of Mexico and their tributaries*, shall be stated in one Act: Therefore,
>
> Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the following regulations for preventing collision shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, *except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North, and *rivers emptying into the Gulf of Mexico and their tributaries*, and are hereby declared special rules duly made by local authority:" (Italics ours).

It is apparent, therefore, that it was never intended to make this Act of Congress applicable to rivers flowing into the Gulf of Mexico and their tributaries.

Section 5 of the Act, which is the repealing clause, reads:

> "*Sec. 5.* That *sections forty-two hundred and thirty-three and forty-four hundred and twelve (with the regulations made in pursuance thereof, except the rules and regulations for the government of pilots of steamers navigating* the Red River of the North and *rivers emptying into the Gulf of Mexico and their tributaries,* and except the rules for the Great Lakes and their connecting and tributary waters as far east as Montreal), and forty-four hundred and thirteen of the Revised Statutes of the United States, and chapter two hundred and two of the laws of eighteen hundred and ninety-three, and sections one and three of chapter one hundred and two of the laws of eighteen hundred and ninety-five, and sections five, twelve, and thirteen of the Act approved March third, eighteen hundred and ninety-seven, entitled 'An Act to amend the laws relating to navigation', and all amendments thereto, are hereby repealed so far as the harbors, rivers, and inland waters aforesaid *(except* the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and *rivers emptying into the Gulf of Mexico, and their tributaries)* are concerned." (Italics ours).

The effect of this repealing clause was to leave in full force and effect, as applying to rivers flowing into the Gulf of Mexico and their tributaries, Section 4233 of the Revised Statutes of the United States, as amended, and the navigation rules contained therein, and also the navigation rules of the Board of Supervising Inspectors amplify-

ing the navigation rules found in Section 4233 of the Revised Statutes, these rules having been made pursuant to the provisions of Article 4412 of the Revised Statutes of the United States.

There is no navigation rule in Section 4233 of the Revised Statutes of the United States comparable to Rule 25 of the Inland Waters Rules. The nearest approach thereto is found in Rule III. of the rules and regulations made by the Board of Supervising Inspectors as required by Section 4412 of the Revised Statutes, amplifying the navigation rules set forth in Section 4233 of the Revised Statutes of the United States, as amended, which reads:

> "RULE III. When two steamers are about to enter a NARROW CHANNEL at the same time, the ascending steamer shall be stopped below such channel until the descending steamer shall have passed through it; but should two steamers unavoidably meet in such channel, then it shall be the duty of the pilot of the ascending steamer to make the proper signals, and when answered, the ascending steamer shall lie as close as possible to the side of the channel the exchange of signals may have determined, as provided by Rule I, and either stop the engines or move them so as only to give the boat steerageway, and the pilot of the descending steamer shall cause his steamer to be worked slowly until he has passed the ascending steamer."

Rule III., by its specific terms, applies to an ascending and a descending vessel: that is, to two vessels under way, and is a rule of the road which has no application to a moored vessel and cannot therefore, be applied to the collision between the DORIS DEAN and the BUTTE.

So far as the rules governing the navigation of the Calcasieu River are concerned, a vessel may run on her right bank or on her left bank or in any other part of that river, provided only that when passing another vessel under way she shall pass the other vessel port to port, as provided by Rule I. of the applicable pilot rules.

We submit, therefore, that the major premise supporting the Court of Appeals' decision in this matter is based on a misapplication of Rule 25 of the pilot rules pertaining to Inland Waters, which does not apply, and that therefore the opinion and decree are incorrect.

Second Assignment of Error.

(Ante, page 12)

Even if Rule 25 of the Inland Waters Rules or some similar rule were applicable to the Calcasieu River, such a rule would not be applicable to the collision between the DORIS DEAN and her tow and the barge BUTTE because these rules are rules of the road, dealing with the passage of vessels, have been so construed, and have been construed as not applying to a collision between a moored vessel and a vessel under way. As between such vessels, the vessel under way has the right of way in every part of the river. *The Belfast*, 226 Fed. 362.

Third Assignment of Error.

Ante, page 12)

Again, even if Rule 25 of the Inland Waters Rules or some similar rule were applicable to the Calcasieu River, such a rule would not be applicable to the collision between

the DORIS DEAN and her tow and the barge BUTTE because such rules apply only to deep draft vessels which are compelled to traverse the usually narrow dredged steamship channels of inland waterways and do not apply and have been construed as not applying to shallow draft vessels which can, with safety, navigate outside of such narrow dredged channels and in any part of the waterways. *The Mary S. Lewis*, 126 Fed. 848.

Fourth Assignment of Error.

Ante, page 12)

Even if there were any rule of navigation which required the DORIS DEAN to proceed on her right hand side of the river, the mere fact that the DORIS DEAN proceeded on the left hand side of the channel was not a fault *per se*, and the Court of Appeals erred in so holding. On numerous occasions the Courts of Appeals in the various circuits have had occasion to consider a similar situation and they have held, particularly in construing Article 25 of the Inland Waters Rules, that proceeding on the left hand side of the channel was merely a condition of a collision with a vessel and not the cause. Two of the most recent decisions are those of the Circuit Court of Appeals for the First Circuit in *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167, and of the Circuit Court of Appeals for the Second Circuit in *The Deutschland*, 90 F. (2d) 454. The decision of the United States Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions in the First and Second Circuits and Your Honors should grant a writ of certiorari to correct and to eliminate such conflict. (See also, post page 24).

Fifth Assignment of Error.

Ante, page 12)

Both the District Court in its findings of fact and the Court of Appeals in its opinion found that the barge BUTTE was unlighted, and this factual finding is not contested by the proctors for the barge BUTTE. One of the gravest errors of which we complain is the failure of the Court of Appeals to consider this phase of the matter and to hold that this omission was a statutory fault which either caused the collision and rendered the BUTTE solely liable therefor, or, at the very least, contributed to the collision, rendering the BUTTE equally at fault with the DORIS DEAN and requiring division of damages between the two vessels.

Rule 12 of Section 4233 of the Revised Statutes of the United States; Act of February 19, 1895, c. 102, 28 Stat. 672, 33 U. S. C. 321, provides:

> "Coal-boats, trading-boats, produce-boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water craft navigating any bay, harbor, or river, by hand power, horse-power, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam-vessels."

The Board of Supervising Inspectors, amplifying this rule pursuant to provisions of Article 4412 of the Revised Statutes of the United States, provided that the light should be displayed on the vessel "forward, not less than eight feeet above the surface of the water" .

Obviously the BUTTE was tied up either in or near the navigable channel of the Calcasieu River and it should not require any citation of authority to demonstrate that it was necessary that that vessel display a white light in the manner required by the cited statute and rule, and that her failure to do so was a statutory fault. However, there is ample authority so holding, and the United States Circuit Court of Appeals for the Fifth Circuit itself has so held in a similar case applying the same rule. *The St. John*, 54 F. 1015. In that case the facts were that the steamer St. John, travelling up Bayou Lafourche on a dark, hazy and drizzly night, collided with a partly loaded coal barge tied up to the bank of the Bayou, projecting some forty feet into the channel. The bayou at that point was 200′ in width. The Court observed that since this was a collision between a stationary vessel and a steamboat under way, there was a presumption of fault on the part of the moving vessel that might be overcome by direct and positive proof; that the location of the barge was such that it was required to carry a light as required by Rule 12 of Section 4233 of the Revised Statutes and the rule adopted by the Board of Supervising Inspectors; that while the rule is imperative that a steamer should keep out of the way of a vessel at anchor, it is nevertheless imperative that a vessel at anchor should display a light, and if she fails in this and a collision occurs, she must bear the loss, unles it appears that with due care she could have been seen and avoided; that in the absence of a light the burden of proof is upon the stationary vessel to excuse her conduct; that the St. John was not proceeding at an unreasonable speed and that she was not at fault; and in concluding and holding the vessel under way not at fault and

the moored barge solely at fault for failure to display a light, the Court said:

> "Is the fact that the barge was not seen before, notwithstanding the absence of a light, presumptive evidence of negligence on the part of the officers or crew of the steamer? The night was dark, hazy and drizzly. It had been raining. The barge or coal boat was but about 2 feet above the surface of the water, with no masts, spars, sails, or upper work, or anything light in color which would be easily visible in the dark, and we cannot consider that the fact that it was not seen until it was within a distance of 175 or 180 feet would show lack of care or diligence. It is testified to that the lookout and pilot were attending to their duties, and they had the right to assume that any vessel or boat in the stream would make itself known by a light. The Scotia, 14 Wall. 181. They were naturally and properly on lookout for lights, and not low, black objects on the surface of the water; and it does not appear that they could with due diligence have discovered it before they did.
>
> "It appears that every precaution to avert the disaster was taken as soon as the discovery was made. * * * We fail to find any fault in the steamer on account of unreasonable speed or lack of lookout, *and consider the absence of a light was the entire cause of the disaster.*" (Italics ours).

In *The Alabama*, 26 F. 866, it appeared that a derrick-boat moored to a bridge pier in the Alabama River, the location of which was out of midchannel and out of the course usually pursued by passing steamers and which was showing no light, as required by Rule 12, was collided

with by the Steamer Alabama under way. The Court held the moored derrick barge solely at fault, saying:

> "That the derrick-boat was moored at a point distant from the channel of the river, meaning the point where the main current of the water passed, is correct; but that the channel of the main current of the water in a river is to be held to be the channel of a river, in the sense of the admiralty, cannot be maintained. Skilled navigators of rivers, especially in high water, do not always follow the main current of the water around bends in the river, but run the 'points', I believe it is called, and so shorten distance and avoid currents. * * * Now, to say that, under such circumstances, a boat of the kind this derrick-boat was, might be moored in the river where those in charge of her might deem that a steam-boat would have no occasion to go, and therefore not be required to expose lights, is a proposition which I think cannot be maintained. I find the fact to be that the derrick-boat was moored where she should have had lights exposed as required by the statute, and, under such finding, the law is—that where there has been a breach of the statutory regulation as to lights exhibited by a vessel, she is prima facie in the wrong, and the burden of proof is on her to show that the want of lights did not contribute to the collision."

In *The Oliver*, 22 F. 848, a small schooner anchored in twelve feet of water and lying 125 feet inside the channel in the Potomac River and displaying no lights, was run into and sunk at midnight by another schooner sailing as close to shore as practicable. There was a haze on the surface of the water at the time of the collision, and although the schooner under way was maintaining a lookout, the schooner at anchor was not discovered until the

moment of the collision. In holding in favor of the vessel under way, the court in the course of its opinion had this to say:

> "Capt. King, the master of the Mechanic, was familiar with the waters of the Potomac in the region of Maryland Point and Nanjemoy creek, and should have been familiar with the habit of the smaller class of sail-vessels, in coming down the Potomac under a stiff breeze from the Maryland shore, to run in tolerably close to shore. In anchoring his schooner in the course apt to be taken by such vessels, he took the risk of whatever might happen there through his fault. * * * In anchoring in the probable course of such vessels, he took all the risks of accidents which might happen through his fault; for an admiralty court would not dare to set such a precedent as to hold that if he had no anchor light up at such a place as the one described, he might recover damages for a collision. That would be setting a premium on acts inviting collisions. * * * But the law of navigation which requires vessels lying at anchor in a fairway to have a light up is imperative. It must be obeyed. It must be effectively obeyed. * * * Lying, as she was, in a fairway without a light, and presenting, as she lay, low down in the water, at midnight, but a small object to the vision of a vessel approaching her from her rear, she invited collision with no light up. The usual presumption of law, against the moving vessel, in favor of the one at anchor, is therefore reversed in this case, and the Mechanic must be held to have been in fault; for, to hold that a vessel lying where she was, without a light in the rigging or a watch on deck, was not in fault, would be to offer a premium for collision."

Not only are the cited cases authority for the necessity of the BUTTE'S showing a white light in compliance

with the applicable pilot rules, but they are authority also for our contention that the cause of the collision was the failure of the barge BUTTE to show a light and that the fact that the DORIS DEAN was travelling on the left hand side of the channel was simply a condition and not the cause of the collision. The DORIS DEAN and her tow could have been stopped in 160 feet (R. 94). Her navigator testified that he had seen, when he was a quarter of a mile off (R. 122), a light on the oil terminal just ahead of where the BUTTE was moored, and not only is there a presumption that if the BUTTE had complied with the statutory obligation to display a light, the DORIS DEAN'S navigator or lookout would have seen it when that vessel was a quarter of a mile off, but there is also the direct testimony in the record of the navigator Doty and the lookout Comeaux that if the BUTTE had displayed a proper light they could have seen her in time to avoid the collision (R. 166, 193-194), and that after they did see her, though everything was done to avoid the collision, it was then unavoidable (R. 124, 129, 141, 166-179).

Even if the DORIS DEAN was navigating on the wrong side of the channel, which we emphatically deny because it was proper for her to run anywhere in the Calcasieu River, nevertheless that was simply a condition and not the cause of the collision and is no ground for holding the DORIS DEAN at fault. See also *The Deutschland*, 90 F. (2d) 454, and *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167.

We therefore submit that the barge BUTTE was solely at fault for this collision and the Court of Appeals should have so held, but even if there was fault on the part of the DORIS DEAN, which we emphatically deny and which we assume only for the purpose of this discussion and without any concession in that regard, it seems indisputable that the barge BUTTE was also at fault for failure to display a light, and that at the very least both vessels should be held at fault for this collision and the damages divided between them.

As we have pointed out in our application for writ of certiorari (ante, page 7), the Court of Appeals has erred grievously in failing to follow the rule established by the Supreme Court of the United States in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, reannounced and reapplied repeatedly, that where a vessel is guilty of a statutory fault, in order to exonerate herself from liability, she carries the burden of showing that such fault not only *did not* cause or contribute to the collision, but that it *could not* have done so; by failing to even consider the failure of the BUTTE to display a light and in failing to hold that that omission at least contributed to the collision; and in departing from its own jurisprudence on the subject, exemplified by *Johnson v. United States*, 4 F. (2d) 102, and perpetuating the error it had committed in *The Standella*, 108 F. (2d) 619. In the interest of brevity we do not reiterate here what we said in our petition for certiorari, but only cite here additional authority.

In *The Chester O. Swain*, 76 F. (2d) 890, decided by the United States Circuit Court of Appeals for the Second Circuit, there was involved a collision in the Mississippi River at New Orleans wherein the Scantic, an anchored vessel violating the statutory rules regarding displaying lights, though she was displaying lights not in compliance with the rules, was collided with by the tanker Chester O. Swain bound down the river. The court found the Chester O. Swain at fault for negligent navigation, but likewise found the Scantic at fault for failure to strictly comply with the statutory rules for the display of lights, saying that she had the burden of showing that her lights "were not confusing to the Swain, and did not contribute to the collision, and that the accident would have still occurred if her lighting had conformed to law".

At the very least this is the rule that should have been applied by the Court of Appeals. There is absolutely no justification for the failure of that Court to consider the barge BUTTE'S fault and its failure to hold that the BUTTE was at least equally at fault with the DORIS DEAN.

Nor can it be said in justification of the opinion of the Court of Appeals that the DORIS DEAN'S fault was gross and the BUTTE'S fault minor, so that the Court would be justified in overlooking the latter. The applicable rule in this regard is well stated by the United States Circuit Court of Appeals for the First Circuit in the comparatively recent case of *General Seafoods Corpora-*

tion v. J. S. Packard Dredging Company, 120 F. (2d) 117. There the Court said:

> "It is well settled law that 'where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.' Alexandre v. Machan (The City of New York), 1893, 147 U. S. 72, 85, 13 S. Ct. 211, 216, 37 L. Ed. 84, 85. Accord, The Victory (The Plymothian), 1897, 168 U. S. 410, 423, 18 S. Ct. 149, 42 L. Ed. 519; The Ludwig Holberg, 1895, 157 U. S. 60, 15 S. Ct. 477, 39 L. Ed. 620; The San Simeon, 2 Cir., 1933, 63 F. 2d. 798. *However, this court long ago said that this rule that where one vessel was guilty of gross fault, the other is presumed not to have been in fault, was artificial and misleading unless very carefully applied.* The Admiral Schley, 1 Cir., 1904, 131 F. 433, 439, affirmed on rehearing, 1 Cir., 1905, 142 F. 64, certiorari denied, sub. nom. Consolidation Coal Co. v. American Mail Steamship Co., 1906, 201 U. S. 648, 26 S. Ct. 762, 50 L. Ed. 905. *Even though the first vessel is grossly at fault, a plain fault on the part of the other vessel is not excused.* The Albert Dumois, 1900, 177 U. S. 240, 253, 20 S. Ct. 595, 44 L. Ed. 751; The Yamashita Kisen Kabushiki Kaisha v. McCormick Inter. S. S. Co., 9 Cir., 1927, 20 F. 2d. 25; The San Simeon, supra. It thus becomes necessary to determine whether the Trim was guilty of a plain fault." (Italics ours).

The court then went on to examine the fault of the Trim, found that vessel guilty of a plain fault, held her equally

at fault with the other vessel, condemned them both and divided the damages.

CONCLUSION.

In conclusion, we submit that the opinion of the Court of Appeals in this case is erroneous, being based as it is on that Court's opinion in *The Standella*, which was itself erroneous; that the decision of the Court of Appeals in this case evidences the intention of the Court of Appeals to perpetuate its error in *The Standella* case and to continue that error in the jurisprudence of the Fifth Circuit, which will result in the jurisprudence of the Fifth Circuit conflicting with the jurisprudence of the other Circuit Courts dealing with admiralty matters; and that to prevent the perpetuation of the manifest errors which have been committed by the United States Circuit Court of Appeals for the Fifth Circuit and to prevent its jurisprudence in admiralty matters from being in conflict with that in other Circuits so as to preserve the uniformity of the admiralty jurisprudence, Your Honors should grant a writ of certiorari to the end that the decision of the Court of Appeals in this case may be reviewed and the errors corrected.

Respectfully submitted,

L. J. BENCKENSTEIN,
GEORGE W. BROWN, JR.,
SELIM B. LEMLE.

August, 1943.

(13)

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 221

J. CLYDE DEAN, DOING BUSINESS AS RED RIVER BARGE LINE, OWNER OF THE TUG, DORIS DEAN,

Petitioner,

versus

BARGE TRANSPORT COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

H. CECIL KILPATRICK,
EDWARD C. CARRINGTON.

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IN THE

COURT OF THE UNITED STATES

October Term, 1943.

No. 221.

N, DOING BUSINESS AS RED RIVER
IE, OWNER OF THE TUG, DORIS

Petitioner,

versus

E TRANSPORT COMPANY,

Respondent.

ESPONDENT IN OPPOSITION TO
FOR WRIT OF CERTIORARI.

STATEMENT.

ıe petitioner, this is an admiralty pro-
ut of a collision between the tug DORIS
w and the barge BUTTE.

the statement appearing in petitioner's
sufficiently set forth the facts in that

it is apparently based on the testimony of the first mate of the DORIS DEAN which on most material points, is contrary to that of his own master, fellow crew members, his engineer and his previous testimony given to the "C" Marine Board of the Bureau of Navigation and Marine Inspection of the Department of Commerce, (R. 133, 134, 135, 136, 137, 141, 142, 143, 160, 161 and 162); and further that the petitioner's statement is based to a great extent on a misconstruction of the holding of the United States Circuit Court of Appeals for the Fifth Circuit in this cause, in that petitioner seems to construe said holding as being based on Article 25 of the Inland Waters Rules instead of the failure of the DORIS DEAN to have a proper lookout, we will endeavor to set forth as briefly as possible the facts as we understand them to enable the Court at the outset to grasp the whole situation presented.

The collision occurred shortly before 3:30 A. M. March 26, 1942, some twelve miles down the Calcasieu River from Lake Charles, Louisiana, while the DORIS DEAN was proceeding downstream just below Shell Oil Company's Haymark Terminal. At the time of the collision the DORIS DEAN, pushing the DEAN-8 was proceeding along the east or her own port bank and collided with the BUTTE which was tied up to the east bank beam to or athwartship of the east bank and about five to six hundred feet below the said Haymark Terminal (R. 179) and at a point where barges frequently moored. (R. 66, 78, 140, 141.) In this vicinity the river makes a straight reach of approximately two thousand feet, one thousand feet of which is above and the remaining one thousand feet below the terminal. (R. 32.) A descending vessel enters the

reach from a right hand bend and leaves it by entering Moss Lake (R. 98) on a gentle turn leftward. Throughout the straightaway the river is between five and six hundred (R. 32), and is navigable by the DORIS DEAN within approximately thirty feet of the bank. (R. 90.)

The DORIS DEAN was a pilot house controlled vessel (R. 149) powered with a 320 horsepower Fairbanks diesel engine (R. 81) and was apparently at half throttle with a favoring one mile current. (R. 16.) Two members of her crew, the only members above decks, were in the pilot house which was located some 190 feet (R. 94, 138, 189) from the forward end of the Barge DEAN-8 (R. 94, 138, 189) behind a cabin ten feet high on the DEAN-8 (R. 84) and there was no lookout forward or elsewhere on the DEAN-8. (R. 138, 189.) There was approximately 300 feet of visibility at the time of the collision (R. 74, 134, 176) and as she proceeded she could be stopped in approximately 160 feet (R. 94) or not within her range of visibility to prevent a collision from where her pilot stood by a margin of some 50 feet. (R. 94, 189, 190.) Prior to and at the time of collision the DEAN-8 was following her left hand or port bank instead of the usual starboard bank in an attempt to keep from getting lost in the haze or fog which existed. (R. 97, 98, 151, 152, 187) and was one hundred and fifty feet east of the channel and within twenty-five feet of the east bank. (R. 112.)

The BUTTE, a steel barge one hundred and sixty feet in length and thirty-two feet in beam (R. 32) as tied up athwartship or beam end to the bank had her inshore side against or approximately five feet from the east

r descending bank (R. 74, 101, 102) and her outshore side pproximately thirty-five feet from the said east bank. R. 74, 101, 102.) The moored barge BUTTE was tied p five or six hundred feet below the dock or terminal nd the bank continued in a straight reach some four to ive hundred feet (R. 125, 179) past the point where the UTTE was moored and from where the bank turns ightly to the left before entering Moss Lake and is a mmon mooring place for barges. (R. 66, 78, 140.)

here was another barge moored further downstream elow the BUTTE and in this last mentioned area. (R. 25.)

The record is not altogether clear as to the conditions f visibility, the master of the DORIS DEAN testified at the visibility was good but hazy until he tied up for g some two miles below the point of collision (R. 98) hile the mate on duty, his deckhand assisting at the heel, his engineer and a disinterested witness, testified at the visibility was three hundred feet or less (R. 73, 07, 134, 135, 189). The crew members called to testify ll agreed that the DORIS DEAN was following the bank prevent getting lost from the bank in the fog. (R. 97, 8, 151, 152, 187.)

At the point of collision the river was from five hundred six hundred feet wide (R. 67, 89, 188) and the channel as approximately in mid-stream and two hundred feet ide. (R. 112.) The DORIS DEAN'S draft, however, nabled her to come within thirty-two feet of the bank t this point.

The forward port (left) corner of the DEAN-8 collided with the forward port (left) corner of the BUTTE, resulting in damage to both vessels. (R. 33.)

Barge Transport Company, as owner of the barge BUTTE proceeded against the DORIS DEAN to recover $1548.00 damages arising out of the collision, and J. Clyde Dean, doing business as Red River Barge Line, the owner of the tug DORIS DEAN and her tow, barge DEAN-8, cross-libeled claiming One Hundred ($100.00) Dollars damages suffered by the barge DEAN-8 in the collision.

The District Court found for the libelant and dismissed the cross-libel. Its findings of fact and conclusion of law will be found in the record, page 30.

The United States Circuit Court of Appeals for the Fifth Circuit affirmed the decree of the District Court. Its opinion rendered May 21st, 1943, is officially reported and will be found in 135 F. (2nd) 731, and will also be found in the record at page 205 ff. An application for rehearing was filed (R. 209) and refused.

The Court of Appeals held the diesel tug DORIS DEAN was at fault for proceeding on a hazy night far out of the channel on her port side of the river near the bank in unsafe water without a proper lookout, citing in support thereof the case of *The Standella*, 108 F. (2nd) 619, in which it was held that a vessel was at fault for proceeding on the left hand side of a narrow channel in violation of Article 25 of the Inland Water Rules, being the Act of Congress of the United States of June 7, 1897, c. 4, Sec. 1, 30 Stat. 101, 33 U. S. C. A. 210, and also citing

the case of *The Ottowa,* 3 Wall. 268, 70 U. S. 268, 18 L. Ed. 165, in which it was held that a propeller driven vessel was liable for the running down of a schooner on Lake Huron at nighttime for not having a proper lookout stationed on the most forward part of the vessel in an unobstructed place, rather than having them remain in the pilot house of the vessel charged with fault as in the case under consideration. Regulations pertaining to such lookouts are covered by Rule 26 of the so-called Navigation Rules for Red River of the North and Rivers Emptying into Gulf of Mexico and Tributaries which is the Act of Congress of the United States of March 3, 1897, c. 389, Sec. 13, 29 Stat. 690; Feb. 19, 1895, c. 102, 28 Stat. 672, 33 U. S. C. A. 351.

We submit that the Court of Appeals was correct in affirming the holding of the District Court. We further submit that the Court did not in effect hold that the DORIS DEAN was at fault *per se* for being to her own left hand side of the channel or that there is any language in the opinion of the Court to indicate that the decision was based on any such point, but that as a matter of fact, the decision turned on the failure of the DORIS DEAN to have a proper lookout or for that matter any lookout while proceeding on her own port side of the channel at night in unsafe water under conditions of limited visibility.

We further submit that had the decision of the Court of Appeals turned on Article 25 of the Inland Water Rules and the International Rules that such rule does pertain to the Calcasieu River, for the reason that Sec. 4233 of the Revised Statutes of the United States, and the rules

adopted by the Board of Supervising Inspectors of the United States pursuant to Sec. 4412 of the Revised Statutes of the United States do not cover or make provision or regulation for the situation contemplated in Article 25 of the Inland Rules, and the International Rules and that these sections of the Revised Statutes are supplementary to the Inland Rules and the International Rules and are only in contradiction thereto in so far as they are in conflict with said Inland Rules and International Rules. (It is conceded in petitioner's brief at page 16 thereof that section 4233 and section 4412 of the Revised Statutes of the United States do not provide such a navigation rule as mentioned in Article 25 of the so-called Inland Rules.)

We further submit that under the Enacting clause of the Inland Rules and the International Rules, which contain the identical Rule 25 or Narrow Channel Rule as the Inland Rules, was made to apply to all American Waters except in so far as contradictory rules were made by local authority (i. e. the Pilot Rules for rivers whose waters flow into the Gulf of Mexico and tributaries, etc.) and since these local rules have not a provision contrary to Rule 25 of the Inland Rules or Rule 25 of the former International Rules, said Rule 25 applies.

We further submit that the Court of Appeals did not hold that the BUTTE had a duty to have a light displayed, and we further submit that she had no duty to have a light showing for the reason that she was moored at a common mooring place, out of the channel or fairway, and was within the pier head line of the terminal immediately above her.

We further submit that the moving vessel must exonerate herself from blame when she collided with a moored vessel in a proper mooring place and that the presumption of fault was on the part of the DORIS DEAN, the moving vessel when she collided with a vessel properly moored out of the fairway or channel, and further in the alternative that had the BUTTE had a duty to have a light showing aboard her, her failure so to do did not cause or contribute to the collision but that the same was caused by the DORIS DEAN failing to have a proper lookout, failing to being able to stop within the limits of her own visibility, and her proceeding on her own port side of the waters involved to the port of or east of the channel in unsafe water within the pier head line of the terminal mentioned in an effort to find the bank during the haze or fog which existed (R. 97, 98, 151, 152, 187.)

We finally submit that the Court was correct in absolving the BUTTE from fault as Rule 12 of Sec. 4233 of the Revised Statutes of the United States regulating the maintenance of lights on anchored or moored vessels pertains only to those "in or near the channel or fairway" and not vessels moored to docks or in other proper mooring places out of the channel or fairway.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

First Point. The collision was occasioned by the fault of the DORIS DEAN in not having a lookout on the barge which was being pushed ahead of her.

Second Point. The collision was occasioned by the fault of the DORIS DEAN in so operating that she could not stop within the range of her visibility.

Third Point. The collision was occasioned by the fault of the DORIS DEAN in violating the Rules of Navigation in failing to keep to her own starboard or right hand side of the channel on navigable waters as provided in Article 25 of the Inland and International Rules.

Fourth Point. The collision was occasioned by the fault of the DORIS DEAN in following the left hand or her own port bank within the pier head line of a known pier or mooring place in fog or haze.

Fifth Point. The BUTTE was not at fault in not bearing a light on the occasion in question and had no duty to do so.

Sixth Point. Had the BUTTE been at fault in not bearing a light on the occasion in question this fact should not render her guilty of joint fault or sole fault and subject to liability therefor as it could not have contributed to the collision under the conditions existing at the time.

Seventh Point. Had the BUTTE been at fault in not bearing a light on the occasion in question, this fact should not render her guilty of joint fault or sole fault and subject her to liability therefor as it was superseded by the cardinal fault of the DORIS DEAN in violating the rules to keep to her starboard side of the channel or fairway, supported by presumption of fault on the part of the moving ship while proceeding through a mooring ground out of the channel or fairway, which presumption the DORIS DEAN did not discharge or overcome.

FIRST POINT.

The Collision was Occasioned by the Fault of the DORIS DEAN in Not Having a Lookout on the Barge which was being Pushed Ahead of Her.

In connection with the allegations of fault against the DORIS DEAN in failing to have a pilot or lookout at the proper station, consideration should first be given to title 33 U. S. C. A. Sec. 351 which provides as follows:

> "Nothing in these rules shall exonerate any ship or the owner, or master, or crew thereof from the consequences of any neglect to carry lights or signals or any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case."

The above rule is Rule 26 of the Pilot Rules or Navigation Rules for Red River of the North and Rivers Emptying into Gulf of Mexico and Tributaries.

The above rule has been a wise and useful aid in navigation of vessels of all types when operating in rivers, harbors and along seacoasts during the nighttime or heavy weather. The rule has been promulgated for the prime purpose of requiring a lookout at some proper vantage point on a moving vessel where the best opportunity to observe ahead could be had and further where he was isolated at such a point so that his sole and full attention could be given to the duties of a lookout without the usual diversion present in the form of instruments, subdued lights, fellow crew members and reflections of lights commonly found on a bridge or in a pilot house and it was made to prevent the very situation brought about on the DORIS DEAN on the night in question when the first mate and his helmsman, the only two people above deck on the DORIS DEAN or the DEAN-8 remained in the pilot house one hundred and ninety feet aft of the front end of the barge DEAN-8 instead of having a lookout on the DEAN-8 as it was pushed by the DORIS DEAN.

It has commonly been held that individuals on bridges or in pilot houses cannot qualify as a proper lookout even on clear nights. It seems that the rules should have demanded the strictest observation and compliance on nights of fog or overcast as when the DORIS DEAN was groping along a bank on her port side of the river approximately two hundred feet east of the channel in order to find the bank and ascertain her position in the river. (R. 97, 151, 152, 187, 188.)

It is not only uncontroverted that the DORIS DEAN had no lookout on the occasion in question, but that more-

over, the two members of her crew in charge of her navigation were not only one hundred and ninety feet aft of the front end of the barge DEAN-8 but moreover were standing in the pilot house the deck of which was only about thirteen feet above the water line, all of which was behind a house ten feet high on the DEAN-8, the DEAN-8 being a house barge (R. 150).

The record shows by the only disinterested witness and by all but one of the other witnesses that the visibility was not over three hundred feet on the occasion in question (R. 78, 135, 176). Incidentally, the only exception to this line of testimony, is that of the mate, Doty, who testified before the "C" Marine Board that he had three hundred feet of visibility on the night in question, but changed this figure to three quarters of a mile on the trial on the merits. (R. 134, 135.) His captain who was asleep prior to the collision described the condition as hazy.

The master of the DORIS DEAN and the helmsman testified that the DORIS DEAN and tow could be stopped within a hundred to one hundred and fifty feet under the conditions as they existed on the night in question (R. 93, 94, 95, 189, 190); it immediately follows that had the DORIS DEAN had a lookout on the DEAN-8 or at any other vantage point he might have been able to have averted a collision on the night in question, but when these crew members remained in the pilot house one hundred and ninety feet from the front end of the barge with only three hundred feet of visibility and the requirement of one hundred to one hundred and fifty feet to stop the tug and tow any possible margin of safety which

might have been acquired by a proper posting of a lookout was lost.

There is no doubt that the DORIS DEAN was following the left bank trying to keep from becoming lost or recover from being lost at the time of the collision (R. 97, 138, 151, 152, 187, 188, 189, 190) but no reasonable explanation has been given as to why the bank on the right hand side of the river was not being followed at least in observation of the dictates of Rule 25 of the Inland Rules and the International Rules.

It has been consistently held that a vessel proceeding in inland waters during a fog must maintain a lookout. The rule was applied by this court in *Managua Nav. Co. et al. v. Aktieselskabet Borgestad* (CCA 5) 7 Fed. (2d) 990.

This has followed the rule laid down in the *Ogdensburgh,* 62 U. S. 548, 21 How. 548, 16 L. Ed. 211. See also *Cianciminos Tow and Trans. Co. v. The Ripple,* 41 Fed. 63; *The Anna W.*, 201 Fed. 58 and *The Lyndhurst,* 92 Fed. 681.

In *The Lyndhurst, supra,* a tug was held jointly at fault for a collision when she failed to keep a lookout and ran into a tow of barges which had been left adrift in a channel and without lights.

Brown, D. J., in delivering the opinion of the court made the following statement:

> "I cannot relieve the tug White from responsibility for failure to have a lookout at the bow of the float which projected about 100 feet beyond the tug. The

man stationed 100 feet more or less aft or
nearly abreast of the tug's pilot house, ir
communicate the necessary orders of nav
the wheelsman on the tug, was the responsi
in charge of the navigation. The authorities
cases insisting on the necessity of a lookout,
other duties to perform, and stationed at t
place, namely, at or near the front. Had
been so stationed, there is no reason to su
this tier of canal boats would not have beer
in time to avoid them, just as they were obs
avoided by the ferry boat below them.
were merly drifting with the tide and had
through the water. It was not such a nigh
have prevented seeing such boats, even
light, at a sufficient distance to avoid them
impossible for the tug to show that a lookou
stationed, and without other duties would
enabled the tug to have avoided the col
must be held in fault. The Pennsylvania
137."

Since it appears clear that a vessel operat
conditions of haze or fog must maintain a l
question then arises as to what constitutes a pr
out.

The petitioner as we take it contends they ha
lookout on watch in the mate and deckhand or
who were located in the pilot house of the DOI
on the night in question.

It appears that this does not meet the leg
ments for a lookout and as a matter of comm
does not appear that those men so located cou

often been held that a lookout must be
forward as practicably possible and that
ld have no other duties to divert him.

70 U. S. 268, 3 Wall. 268, 18 L. Ed. 165,
vessel had been libeled for the running
ner bound in the opposite direction on
nighttime. Among the faults charged
wa was her failure to have a proper
aboard her at a proper position.

ford, delivering the opinion of the court,
nstituted a proper lookout, said the fol-

kouts are competent persons other than
d helmsman, properly stationed for that
the forward part of the vessel; and the
n the nighttime, especially if it is very
view is obstructed, it is not the proper
hn v. Paine, 10 How. 585; Genesse Chief,
Lookouts stationed in positions where
ward or on the side to which they are
obstructed, either by the lights, sails,
ars of the vessel, do not constitute a com-
the requirement of the law; and in gen-
positions such as the hurricane deck,
vorable situations as those more usually
he forward part of the vessel, nearer the
berlain vs. Ward, 21 How. 570, 16, L. Ed.
s stationed on the forward deck are
ater line and consequently are less likely
small vessels, deeply laden, and more
tain their exact course and movement.
alt. Steam P. Co., 23 How. 292, 16 L. Ed.

563; the New York v. Rae, 18 How. 223, 15 L. Ed. 359. Applying these rules to the present case, it is clear that the propeller did not have any proper lookout, and it will be sufficient to say that we adhere to those decisions without abatement or qualification."

Again in *The Michigan,* (CCA 4), 63 Fed. 280, Cert. Den. 159 U. S. 262, 40 L. Ed. 142, the same rule was recognized. In that case the steamship Michigan was libeled by the owner of a schooner for running down the same in the nighttime during fog near Cape Henry, Virginia. In this case the rule of *The Ottawa, supra,* was recognized in the following language:

"It was impossible for a man standing 40 feet back of the stem, on this lookout bridge, to keep a proper lookout, especially in hazy weather, at night, for the large class of vessels lying low on the water, which navigate the approaches to the Virginia capes. It was a flagrant fault in The Michigan that on the occasion of this collision that she had no lookout in her bow, close up to her stem, in position to look over the point of the vessel on each side, and to discover in good time vessels that might be ahead of her in her course. The lookout of The Michigan seems from his own evidence to have been of no service on the occasion. He says that he reported no light from 3:00 o'clock to the time of the collision. He saw no red light on the schooner. Even at the collision he saw no light. It seems that the lookout of the steamer could see nothing, and the rest of the crew could hear nothing, which could have been of use in avoiding the accident. Masters of ships are not at liberty to adhere to machine rules in matters as important as the duties of lookouts. On the broad ocean, under clear skies,

it may be sufficient for a lookout to be 30, 50, 40 feet back of the stem of a ship, and 30 feet in the air from the water; but in fogs and in emergent crises, when it is necessary to be alert, and to meet every unusual exigency, it is the duty of a lookout to be at the place on the ship where he can best see what is in her path, and to be in the best position to discover and report all that is to be seen and all that should be reported. On the occasion under consideration the lookout was not where he could see the vessel ahead of him, and, mainly on that account, was inefficient, useless and neglectful. The Michigan was in fault in not having a competent lookout in her bow, close to her stem, diligent in duty, alert to see what was before him, and prompt in reporting in time the position of The Holland."

In *The Wilbert L. Smith*, 217 Fed. 980, the rule of *The Ottawa, supra,* was again followed. In that case a tug was charged with fault in not having a proper lookout when involved in a collision at night in foggy weather when it had merely a master and pilot or helmsman in the pilot house of the tug.

Neterer, D. J., in his opinion said the following:

"A lookout is a person who is specially charged with a duty of observing the lights, the sounds, and the echoes, with that thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or that of any other person about the ship. And it is the duty of the courts charged with admiralty jurisdiction to give the fullest effect to such duty when the circumstances are

such as to call for its application, and every doubt as to the performance of the duty or the effect of non-performance should be resolved against the vessel in the fault until the contrary is shown by the testimony. The Ariadne, 13 Wall. 475, 20 L. Ed. 542; Wilder's Steamship Co. v. Low, 112 Fed. 172, 50 C. C. A. 473; J. C. Ames, (D. C.) 121 Fed. 918."

In view of the rules as to the maintenance and provision of a lookout and the uncontradicted testimony of the only two men above deck at the time of the collision above quoted, it must follow that the DORIS DEAN was grossly at fault in not maintaining a lookout. The conclusion must be that the DORIS DEAN was at fault in not having any lookout nearer than one hundred and ninety feet from the forward end of the barge which she was pushing and one can hardly imagine a case or circumstance demanding the aid of a lookout to a greater extent than did the DORIS DEAN on the occasion in question and under the circumstances which existed at that time.

SECOND POINT.

The Collision was Occasioned by the Fault of the DORIS DEAN in so Operating that she could not Stop within the Range of Her Visibility.

Article 16 of the Inland Rules and International Rules, which has never been altered or changed by reason of local rules, reads as follows:

> "Every vessel shall in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to existing circumstances and conditions." (33 U. S. C. A. 192.)

Common sense dictates that this should mean that a vessel should be able to stop within the limits of her visibility. The rule of decision exacts even higher requirements of a vessel traveling under the conditions described in the above article. In *The Silverpalm,* (CCA 9) 94 Fed. (2d) 754, Denman, C. J., stating the rule applicable said as follows:

> "One of the very long-established principles of law in maritime navigation is that a vessel shall not proceed in a fog at a speed which she cannot be stopped dead in the water in one-half the visibility before her. The Chattahooche, 173 U. S. 540, 548, 19 S. Ct. 491, 43 L. Ed. 801; The Umbria, 166 U. S. 404, 421, 17 S. Ct. 610, 41 L. Ed. 1053; The Lepanto, (D. C.) 21 F. 651, 659; The Old Colony, (D. C.) 52 F. (2d) 992, 993; The Ernest H. Meyer, (C. C. A. 9) 84 F. (2d) 496, 497."

In the situation now under consideration it is perfectly clear that the DORIS DEAN could not be stopped within the limit of visibility of her mate and helmsman in the pilot house one hundred and ninety feet aft of the DEAN-8's stem.

The testimony of the helmsman of the DORIS DEAN (R. 189, 190) and her caption (R. 94) testified in effect that they could not stop the DORIS DEAN within the range of their visibility.

It seems conclusive that in view of the foregoing testimony referred to, the DORIS DEAN was being negligently operated in not being able to stop within the limit of her visibility or half of her visibility and that her being

so operated constituted one of the several faults attributable to her which caused the collision and damages heretofore related.

THIRD POINT.

The Collision was Occasioned by the Fault of the DORIS DEAN in violating the Rules of Navigation in failing to keep her own Starboard or Right Hand Side of the Channel on Navigable Waters as provided in Article 25 of the Inland and International Rules.

First before consideration of the application of *The Standella*, 108 Fed. (2d) 619 and like holdings to the case under consideration, it appears proper to give some consideration to the question of whether or not Article 25 of the Inland Rules or Article 25 of the International Rules, both being identical and both being known as the Narrow Channel Rule, apply to the Calcasieu River.

A most casual and superficial examination of the so-called Inland Rules, the International Rules and the authorities, the statements and quotation set forth on petitioner's brief on page 14 thereof make it obvious that Article 25 of the Inland Rules and the International Rules does [redacted] apply to the Calcasieu River. The preamble of the so-called Inland Rules, quoted at the above point in petitioner's brief reads as follows:

> "Whereas, the provisions of Chapter eight hundred and two of the Laws of eighteen hundred and ninety,

and the amendments thereto, adopting regulations for preventing collisions at sea (i. e., International Rules), apply to all waters of the United States connected with the high seas navigable by sea going vessels except so far as the navigation of any harbor, river or Inland waters is regulated by special rules duly made by local authority; and

"Whereas, it is desirable that the regulations relating to the navigation of all harbors, rivers and in inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North, and rivers emptying into the Gulf of Mexico and their tributaries, shall be stated in one act: Therefore,

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled that the following regulations for preventing collisions shall be followed by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North, and rivers emptying into the Gulf of Mexico and their tributaries, and are hereby declared special rules made by local authority."

The first paragraph of the preamble reaffirms the International Rules and affirms the fact and provides as law that the International Rules and Inland Water Rules, including Article 25 in both instances applies to all waters navigable to seagoing vessels within the continental limits of the United States except in so far as these waters and

harbors and rivers or other inland waters are regulated by special rules duly made by local authority. In the enacting clause, the Inland Rules are declared to be "Special Rules made by local authority" and thereby it is obvious that the Inland Rules were meant to apply as local rules under title 33 U. S. C. A., Sec. 131, a portion of International Rules which provides as follows:

> "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbor, river, or inland waters."

33 U. S. C. A. Sec. 301, being the preliminary and introductory clause to the Navigation Rules for Red River of the North and rivers emptying into the Gulf of Mexico and tributaries provides as follows:

> "The following rules for preventing collisions on the water shall be followed in the navigation of vessels of the Navy and of the Mercantile Marine of the United States upon the Red River of the North and rivers emptying into Gulf of Mexico and their tributaries.
>
> "Such rules and regulations pursuant to the provisions of this chapter are hereby declared Special Rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in Article 30 of Chapter 2 of this Title, Sec. 131."

Since this very preliminary clause of the Rules for Navigation of Red River of the North and rivers empty-

ing into the Gulf of Mexico and tributaries quoted above refers back to 33 U. S. C. A. 131, a portion of the International Rules, providing for nothing within the International Rules to interfere with special rules duly made by local authority, then it follows that the International Rules and Art. 25 thereof applies to rivers flowing into the Gulf of Mexico in so far as there is nothing in the special rules for these waters similar to Art. 25 quoted. (The fact of there being no similarity to Rule 25 of the Inland or International Rules within the special rules for the waters here involved is admitted at page 16 of petitioner's brief.) In *6 Benedict on Admiralty 454* it is pointed out that the rules for the Red River of the North and rivers emptying into the Gulf of Mexico and tributaries are supplementary to the Statutory Rules. The "statutory rules" so supplemented means the Statutory International Rules and rules passed in connection therewith which includes the much discussed Art. 25, which as has been pointed out is the same in both Inland and International Rules and likewise bears the same article number and terminology under the New Rules of the Safety of Life at Sea Conference of 1929.

The petitioner has overlooked the provision within the preamble to the Inland Rules quoted at page 14 of his brief which affirms the provisions of Chapter eight hundred and two of the Laws of eighteen hundred and ninety and amendments (i. e. the International Rules) except in so far as they are altered by "special rules of local authority" and we have seen that the very preliminary section to the rules for the rivers whose waters flow into the Gulf of Mexico, etc. (i. e. 4233 and 4412 and regula-

tions pursuant thereto) declares them to be special rules of local authority.

Obviously then, either Art. 25 of the Inland or International Rules applied and since their terminology is identical it should make little difference which is mentioned as applying.

It is significant, moreover, that petitioner has failed to cite one authority to the effect that Art. 25 of the Inland and International Rules does not apply on the rivers emptying into the Gulf of Mexico. His position is peculiarly unique to him so far as any decided cases indicate.

In 33 U. S. C. A. Sec. 110, same being Article 25 of the International Rules, and 33 U. S. C. A. Sec. 210, same being the Inland Rules to the same effect reads as follows:

> "In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

It is pointed out in *6 Benedict on Admiralty* at page 367 that the International Rules as presently in force and effect are the Rules of 1897, which have never been amended. However, the Safety of Life at Sea Conference of 1929 gave the 1897 rules a thorough re-examination and agreed on a new text, which became annex II of the Safety of Life at Sea Convention. While the new text has not yet been put into force, and efforts to give it effect must await the return of peace, it represents the best considered statement by the world leading experts

in the art of navigation, as to what the rules should be. The 1897 Rules and the 1929 recommendations are, therefore, printed at the above citation in parallel columns. It is pointed out at such point that the International Rules of 1929, which await promulgation by uniform action of all maritime nations include Art. 25 providing identically the same as the above quoted rule.

Hence, it is obvious that not only has this wise provision appeared in every set of General Rules enacted by Congress, but it has been encompassed within the provisions of the New Safety of Life at Sea Conference of 1929 to continue as the law of the land. See U. S. Statutes at L. Vol. 50, p. 1121, *6 Benedict on Admiralty*, p. 385.

In *The Standella*, 108 Fed. (2d) 619, wherein a certain tug and barge owner filed a libel against the motor ship, Standella, when the Standella on a foggy afternoon when visibility was about three hundred feet, while outbound in Galveston Bay, collided with the inbound tug by reason of the fact that the Standella had not followed the above quoted statute requiring her to keep to her own starboard side of the fairway or channel. The Standella charged the tug with fault in failing to stop her engine when danger became imminent. This court in holding the Standella primarily at fault for the collision, through her being on the wrong side of the channel and absolving the tug despite the fault of the tug, said through McCord, C. J.:

> "The M/V Standella was guilty of a most serious Statutory fault when she navigated on the port side of the fairway or mid-channel. Section 210, 33 U. S. C. A. provides: 'Steam vessels in narrow channel,

Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.' This is a cardinal rule of navigation and applies as well in fog as in clear weather. The most ignorant navigator will be presumed to know this simple and wise requirement. The Yarmouth, D. C., 100 F. 667; the Newport News, 4 Cir., 105 F. 389, 393.

"The evidence is in sharp conflict as to whether or not the M/V Standella was sounding a fog signal prior to the collision. It is without dispute that the Andrew failed to stop or reverse her engine, and that at the time of the disaster she was moving at a speed of about two or two and one-half miles per hour. It is clearly shown, however, that the failure of the Andrew to stop or reverse her engine did not cause the accident. Her failure to stop in no wise contributed to the collision. The M/V Standella was moving out to sea on the wrong side of the channel. Had the Andrew stopped her engine she would have been in the path of the oncoming M/V Standella and the collision would have in all probability been more serious than it was. The liability for damages is upon the ship or ships whose fault caused the injury and where, as here, the fault of one vessel could have had nothing to do with the collision that fault may be dismissed from consideration. The Pennsylvania, 86 U. S. 125, 136, 22 L. Ed. 148; the Providence, (D. C.), 282 F. 658, 661.

"The failure of the M/V Standella to comply with Article 25 was the sole cause of the collision and she must answer in damages for the injuries sus-

tained by the Andrew. The Vanderbilt, 73 U. S. 225, 18 L. Ed. 823; The Providence, (D. C.), 282 F. 658; The Pennsylvania, 86 U. S. 125, 22 L. Ed. 148."

Hence it is apparent that this rule has not only been applied in the Fifth Circuit but from the cases cited is in harmony with the jurisprudence of the First and Fourth Circuits.

One other thought appears pertinent under this statement, and that is that there is a rule of law which provides that when a moving vessel collides with a vessel moored at a proper anchorage, the moving vessel has the burden of exonerating herself from blame by showing she could not have prevented the collision by reasonable precautions. In this connection she assumes a burden of overcoming a presumption. This rule is set down in *The Granite State,* 3 Wall. 310, 18 L. Ed. 179; *The Oregon,* 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943; *The Virginia Ehrman,* 97 U. S. 309, 24 L. Ed. 890; *Dahlmer v. Bay State Dredging and Contracting Company,* 26 Fed. (2d) 603. Certainly the DORIS DEAN has not met any such burden.

Moreover, it has been held that the above rule applies to shallow draft vessels. In the *Ida B. Conway* (D. C. Md. 192), 22 F. (2d) 182, and *Johnson v. United States* (Old Ala. 1925) 4 F. (2d) 102, the above rule was construed to apply to a small motor cruiser and a tug. Hence there can be no doubt as to the applicability to the DORIS DEAN and her tow.

Petitioner in his Fourth Assignment of Error takes the position that violation of Article 26 of the Inland Water

Rules was merely a condition of a collision and not a cause and cites as authority therefor *Merchants & Miners Transportation Co. vs. Nova Scotia S. S. Co.*, 40 F. (2d) 167, and the *Deutschland*, 90 F. (2d) 454, from the Second Circuit and claims that the holdings of these two decisions are in conflict with the *Standella, supra.*

In *Merchants & Miners Transportation Co. vs. Nova Scotia S. S. Co., supra,* there was involved the appeal from a decree awarding the steamship Evangeline, damages against the steamship Grecian, and denying the libel of the Grecian, which libels claimed damages to both vessels when the same met port to port while in waters called Pollock Rip Channel. The appeal of the owners of the Grecian resulted in the affirming of the District Court decision and therein it was stated that the Grecian's claim that the Evangeline was at fault for proceeding on her own port side of a narrow channel was without merit because the facts showed that the Grecian herself had violated Article 25 and was in fact a vessel too far to her own port side of the channel. The only question of doubt in the court's mind as to whether or not there was any liability on the part of the Evangeline was as to whether or not she had observed Article 16 of the Inland Rule providing:

> "Every vessel shall in fog, mist, falling snow or heavy rainstorms go at a moderate speed, having careful regard to the existing circumstances and conditions."

It was pointed out that it was a violation of Article 16 if the Evangeline could not stop her way within such

visibility as existed after sighting another vessel. This decision affirmed the decree of the Evangeline against the Grecian and denied the Grecian any relief on its libel, because the Grecian had violated Article 25 of the Inland Rules, the Evangeline was found to have complied with Article 16 of the Inland Rules and the court found that the Grecian did not use her whistle or wireless or other means to make her presence known. Respondent submits that there is not a scintilla of accuracy in the statement that *Merchants & Miners Transportation Co. v. Nova Scotia S. S. Corp., supra,* is a contrary ruling to the *Standella, supra,* or that it holds that Article 25 of the Inland Rules through its violation cannot cause a collision, and is merely a condition; but that in truth and in fact this decision relied on by petitioner is in accord and is consistent with the *Standella, supra,* and is authority for the contention of respondent herein.

In *S. S. Deutschland, supra,* the Deutschland, a trans-Atlantic vessel in-bound to New York Harbor collided with the S. S. Munargo proceeding down from a North River pier in New York Harbor to the Erie Basin. The weather was clear, visibility good and the time 5:42 P. M., or during conditions of darkening. Both vessels filed libels and the Munargo claimed fault against the Deutschland under Art. 25 of the Inland Rules because of her being on her own port side of the channel.

At the place of collision the vessel had a great deal of water to navigate in, the channel being about several thousand feet wide, but it was shown to be usual and necessary for vessels of the size of the Deutschland to

keep to the port or south side of the channel to avoid east river traffic and to more directly reach their North River berths. As the vessels approached they were some five hundred feet starboard to starboard of one another and had the vessels stayed on their courses they could have passed starboard to starboard by some five hundred feet. The Deutschland was visible by the Munargo for an unlimited distance, moreover the Deutschland blew two whistles three times for a starboard to starboard passing, and then three whistles when she reversed on seeing the Munargo start to cross her bow to attempt the port to port passing. The court pointed out that not only had the Deutschland given proper signals but that her funnels were illuminated so the blast would be visible. The court also pointed out that the Deutschland properly gave her signals for her announced intentions when the vessels were approaching green to green and that the collision would not have happened if the Munargo had pursued the course required under the situation. The court merely affirmed the trial court in holding the Munargo solely at fault when she attempted a port to port passing after proper signals for a starboard to starboard passing had been given and when the situation required such a passing. There is no utterance in this opinion to the effect that violation of Article 25 of the Inland Rules cannot be a cause, but is merely a condition surrounding a collision. The effect of the decision is merely that under conditions of unlimited visibility and when the facts and situations warrant a starboard to starboard passing a ship can be absolved of liability though on her port side of a channel.

The *Mary S. Lewis,* 126 Fed. 848, a District Court decision, involved a situation where the tug Mary S. Lewis,

a shallow draft vessel, ran into a sunken scow of the Virginia Dredging Company which sunken scow had foundered slightly to the side of a 450 foot channel 20 feet deep and there was an anchorage basin 16 feet deep and 300 feet wide to the side of the channel. The Mary S. Lewis claimed that no proper buoys or markers had been placed out above the sunken wreck so as to make her visible. The Virginia Dredging Company as owners of the sunken scow claimed fault on the part of the Mary S. Lewis in being to her left or port side of the channel and in the anchorage basin 300 feet wide. The court merely held that the Mary S. Lewis was proceeding in a properly dredged portion of the anchorage basin on the side of the channel as she had a right to be.

It appears from the decision that the same duties would not be owed to a vessel sunk below the water and out of sight from sinking and one moored at a common mooring place near a dock and where a vessel is out of the channel or fairway. In any event the *Mary S. Lewis, supra*, is not authority to rebuke the rule laid down in *Johnson v. the United States* (C. C. A. 1925) 4 F. (2d) 102, holding that under Article 25 of the Inland Rules that when Article 25 was violated by a moving tug, the burden was on the tug not only to show that its violation of this rule did not cause the collision but that such violation could not have dne so.

Not only do these authorities relied on by petitioner appear to refute rather than sustain his contention, but moreover they appear to bear out the soundness of the *Standella* decision and the holding of the Court of Appeals in this case.

FOURTH POINT.

The Collision was Occasioned by the Fault of the DORIS DEAN in Following the Left Hand or Her Own Port Bank within the Pier Head Line of a Known Pier or Mooring Place in Fog or Haze.

The petitioner has sought to make out his whole case against the BUTTE relying on Rule 12 of Sec. 4233 of the Revised Statutes of the United States; Act of February 19, 1895, c. 102, 28 Stat. 672, 33 U. S. C. A. 321, this being a portion of the Pilot Rules for the rivers whose water flow into the Gulf of Mexico and their tributaries, and the Red River of the North, which rule provides as follows:

> "Canal boats, trading boats, produce boats, canal-boats, oyster-boats, fishing-boats, rafts, or other water craft navigating any bay, harbor, or river, by hand power, horsepower, sail, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the Board of Supervising Inspectors of steam vessels."

As stated by the petitioner, the Board of Supervising Inspectors, amplifying this rule pursuant to provisions of Art. 4412 of the Revised Statutes of the United States, provided that the "light should be displayed on the vessel forward, not less than eight feet above the surface of the water".

Respondents certainly have no quarrel with the provision of this rule and recognize the wisdom prompting

passage thereof. However, as the petitioner points out that the rule stated as well as all other similar rules of navigation, are effective as to vessels "which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river". Respondent urges, however, that the BUTTE was not anchored in or near the channel or fairway on the occasion in question and such fact should absolve the BUTTE from any fault in connection with the collision.

It has already been amply pointed out that the DORIS DEAN and her tow on the occasion in question were one hundred and fifty feet or more east of the channel or fairway and the Court of Appeals has fully pointed out in its opinion that the DORIS DEAN and tow were proceeding in unsafe water without a lookout. The Court of Appeals did not elaborate in its opinion on why it found the water unsafe at the point of collision but under the record it is certainly safe to assume that it meant not only the proceeding of the DORIS DEAN and tow too near the bank in shallow water and on the port side of the river of said moving vessel, but that further it meant proceeding through a mooring ground where vessels were known to frequently tie up.

The only disinterested witness, Herman M. Slaydon, the terminal guard, who was called in this case, testifying as to the facts surrounding this collision, testified that he saw barges moored at the point of collision at all times, (R. 77-78.)

Fred S. Newman, an employee of the Barge Transport Company, testified that his company had barges at the

point in question below the Haymark Terminal on frequent occasions and that moreover, he knew of at least one other line which did likewise, (R. 65-66).

Lee Doty, the mate of the tug DORIS DEAN, who was on duty on the occasion in question, testified that he knew it was a common practice to anchor or moor vessels at the Haymark Terminal and further testified that sometimes they were lighted and sometimes they were not, and that on past occasions their presence was the reason he slowed down at this point. (R. 140-141.)

Moreover, Fred S. Newman testified that the dock of the Haymark Terminal below which the BUTTE was tied, projected one hundred feet from the bank to the outside of the dock. (R. 65.)

Ralph Comeaux, the helmsman on the DORIS DEAN testified that there were two barges at the point in question and that the BUTTE was the upstream barge or the one nearest the Haymark Terminal. (R. 178.)

The Court of Appeals found that the DORIS DEAN and tow after passing the Shell Terminal which extended one hundred feet into the river from the east bank, continued at an angle to the river bank instead of parallel with the east or port bank, so as to come in contact with the outshore side of the BUTTE which as has already been shown was only thirty-five feet out from the east bank.

The testimony of crew members of the DORIS DEAN that she was following the bank to prevent getting lost is borne out by the testimony of Lee Doty, the DORIS

DEAN'S mate, to the effect that he knew that vessels were frequently moored at the Shell Terminal, as certainly had the DORIS DEAN not been confused as to her location she would have given this area a wider berth.

Moreover, the fact that another similar barge was tied up along the east bank, downstream from the BUTTE or further from the terminal, bears out the fact that the tug DORIS DEAN and tow on the night in question were operating through a known mooring ground and dangerously within the pier head line of the dock below which the BUTTE and the other barge had been moored. Another point of testimony which is of importance in this connection and which will hereafter be pointed out at another point, is the testimony of Herman M. Slaydon, the distinterested witness, who was a guard at the said terminal, to the effect that had lights been on the barge BUTTE he doubts whether or not they could have been seen due to the haze or fog which existed. (R. 75-76.)

The very year that Rule 12 was passed, the same was construed in *The Martin Dallman* (CCA 4) 70 Fed. 797, in a case almost identical with the situation presented here only that the tug in that instance was operating in a two hundred foot channel instead of one nearly six hundred feet in width. In that case the owner of a schooner which was moored unlighted to a wharf at the side of the river channel two hundred feet wide filed a libel against the tug, Martin Dallman, for damages when a barge being towed by the tug collided with the port quarter of the moored schooner. From a decree dismissing the libel the owner of the schooner appealed. The respondent had con-

tended that under Rule 12 above quoted the schooner was moored at an improper place and further that she was at fault because she had no lights.

Goff, C. J., in delivering the opinion of the court which reversed the trial court had the following to say:

> "Finding as we do that the Clark was properly fastened at a place where she had a right to be, we now proceed to consider the question whether or not she was required, under the laws and regulations in such cases applicable, to display a light at the time she was so moored. That she had no light is conceded. Under the circumstances, moored to the wharf, not being in motion, we are not aware of any statute which requires her to have a light. We do not think that Rule 12 of Sec. 4233 of the Revised Statutes of the United States applies to vessels situated as the Clark then was. She was not 'anchored or moored in or near the channel or fairway of any bay, harbor or river,' in the true meaning of said rule, but she was fastened or moored alongside of a wharf, with at least 200 feet of clear water outside, between her and the outer edge of the channel. But, if the law did require that the Clark should have displayed a light, does it follow that the Dallman, under the evidence in this case, was not to blame for the collision? Certainly not. The schooner was helpless—was tied to the wharf; and great caution was therefore required on the part of the steam tug when she endeavored to turn with her tow into the channel of James Creek Canal."

In the *Granite State, supra,* which, however, predated Rule 12, announced the same rule in the following language:

"It is not controverted that the barge, which was fastened to the end of the pier, was in a place she was entitled to occupy that she was not required to have a light suspended during the nighttime, as vessels anchored in the channel are required, nor to have a watch kept on board to waive off steamboats using the channel of the river. She was not on any track the steamer required to take, and, being incapable of motion, cannot be justly charged with any participation of fault in causing the collision. As in the case of The Louisiana, recently decided (3 Wall. 164) there was no unusual convulsion of the elements or sudden hurricane which nautical men could not anticipate; no vis major causing a collision which a proper display of nautical skill might not have prevented. Under such circumstances we are not called upon to inquire wherein the steamboat was not managed with proper nautical skill; whether the bright light which the steamboat had, or ought to have had, was not sufficient to warn her in time of her proximity to the pier if careful watch had been kept; whether she should not have backed her engine instead of rushing forward; whether she should have ported or starboarded her helm. All these inquiries are superfluous where the collision was caused by a vessel having the power to move or stop at pleasure in a channel of sufficient breadth, without any superior force compelling her to the place of collision. The fact that in those circumstances the steamboat did collide with the barge is conclusive evidence that she was not properly managed, and that she should be condemned to pay the damages caused by the collision."

The case under consideration has a stronger set of facts in favor of the moored vessel than were present in the

Martin Dallman case, *supra*, because in the *Martin Dallman* case the moored vessel was anchored or moored at the end of the pier outside of its pier head lines, when in the present case the BUTTE was tied to the bank with its outshore side some sixty-five feet inside of the pier head line with the result that had the DORIS DEAN continued on her course and direction paralleling the pier head line she would have cleared the BUTTE and the other barge moored below by some sixty-five feet.

Even were the holdings in the *Standella, supra*, to be in error wherein they provided that the cardinal fault of the moving vessel in violating Article 25 of the Inland Rules, would render the minor fault of a vessel involved therewith subject to being overlooked because of the importance of Article 25, nevertheless, under the settled facts which exist in this case, it would appear that the DORIS DEAN was solely at fault when it is considered that under the great preponderance of the evidence, if not all the evidence that the BUTTE was in a proper mooring place out of the channel or fairway where vessels frequently moored and were known to moor and within the pier head line of a pier. It seems clear that Rule 12 of Section 4233 of the Revised Statutes did not apply to the BUTTE.

Respondent certainly has no quarrel with the authorities relied on by petitioner in support of Rule 12 of Sec. 4233, Revised Statutes of the United States, to-wit: *The St. John*, 54 F. 1015, *The Alabama*, 26 F. 877, *The Oliver*, 22 F. 848, *The Belfast*, 226 F. 362.

In the *St. John, supra*, the facts were that a steamer ran into an unlighted barge which was anchored in a canal

only two hundred feet wide, not near a dock and at a point in the canal where the water was deepest and a steamer was most likely to pass.

In *The Alabama, supra,* a barge or dredge was held at fault for being tied up without a light to a pier which furnished one of the midchannel piers for a bridge being built across the Alabama River at Selma, Alabama. The main channel was on one side of the pier and on the shore side of the pier was approximately one hundred feet of navigable water between it and the shore. Obviously there should have been a light on the dredge or pier to which it was tied near the middle of a navigable river. The case is not in point with the situation under consideration, and the use of the word "pier" in the decision is misleading as the word ordinarily refers to a pier attached to the shore on land.

In the *Oliver, supra,* a schooner was held at fault for being anchored some two miles off a point in the Potomac River and though it was anchored one hundred and twenty-five yards outside of the deep channel buoys, it was in the area where sailboats were known to pass and it was a sailboat which collided with the unlighted anchored schooner, and it was known practice for such schooners to navigate a mile inside of this channel line near which the Oliver had been anchored.

In the *Belfast, supra,* a District Court in Massachusetts held that a moving vessel had superior rights to a barge anchored in midchannel or a roadstead when this barge was improperly lighted.

These cases cited by petitioner are undoubtedly sound. However, petitioner has failed to distinguish between the facts involved in those cases and those involved in the case before the Court. Rule 12 above cited simply did not apply to the BUTTE because she was out of the channel or fairway and the Court of Appeals has found that she was well within the pier head line of the pier below which she was moored.

A consideration of this brief immediately suggests that there is great irreconcilable conflict between the decisions as to whether or not the burden of proof is upon the anchored or the moving vessel in such a collision to show herself free of fault contributing to the collision. There is abundant authority that the burden is on the moving vessel and as much authority to the effect that the burden is on the anchored vessel.

A further consideration of this problem, however, makes it clear that the two lines of cases are not in conflict.

The rule seems clearly to be that if the anchored or moored vessel is out of the channel or fairway, she has no duty to be lighted and the burden of proof in event of collision is on the moving vessel. On the other hand the rule seems to be that if the anchored or moored vessel is in the channel or fairway unlighted, the burden shifts to her to show herself free from fault.

FIFTH POINT.

The Butte Was Not at Fault in Not Bearing a Light on the Occasion in Question and Had No Duty to Do So.

As has already been pointed out from the record, it appears uncontradicted that the BUTTE was moored to the bank at the point of the collision with her outshore side only thirty-five feet from the east bank of the river, (R. 74, 101, 102) at a point where the river was from five to six hundred feet wide (R. 67, 89, 188), where she was some one hundred and fifty feet east of the channel (R. 112) and only five to six hundred feet below the dock or terminal (R. 125, 179); that moreover, we have seen from the record that she was tied at a common mooring place (R. 66, 78, 140), at a place where a terminal guard said barges were moored all the time (R. 77, 78) and where barges were known to have been both lighted and unlighted by the testimony of the mate in charge of the DORIS DEAN. (R. 140, 141.)

Since she was at a proper mooring place and admittedly out of the channel or fairway in the immediate vicinity of a dock where vessels were customarily moored and within the pier head line of pier at that point, it is difficult to see how the BUTTE had any obligation or duty on the occasion in question to bear a light of any kind. Petitioner to attribute any fault whatsoever on the BUTTE must show that she was in the channel or fairway to even make her amendable to Rule 12 of Sec. 4233 and 4412 of the Revised Statutes of the United States, and heretofore quoted and which provides for the bearing

of lights on various types of boats, including a vessel such as the BUTTE when "in or near the channel or fairway."

We have seen in the *Martin Dallman, supra,* that where an unlighted schooner was moored alongside of a wharf, with 200 feet of clear water between her outshore side and the opposite bank of the waterway, that it was not fault for the vessel so moored not to bear a light under such conditions. It should be borne in mind in this case that under the *Martin Dallman* decision the libelant claiming fault on the part of the schooner, had a stronger set of facts than petitioner in the present case, for under the facts in that case the schooner was moored to the outshore side of the pier in question, whereas under the circumstances now under consideration the barge BUTTE was tied to the bank immediately downstream from the pier and with her outshore side some sixty-five feet within the outside pier head line of the Haymark Terminal.

Each and every authority relied on by petitioner claiming fault on the part of the BUTTE for not having a light includes terminology in the decisions of the courts holding that one vessel or another was at fault for not having a light while anchored or moored in the channel or fairway. Without exception each and everyone of those cases points out that the moored or anchored vessel charged with fault was in the fairway or channel.

Not only was the BUTTE not at fault in not having a light aboard her on the occasion in question, but as hereafter pointed out in Point Six, it is obvious that the settled rule is that when a vessel is properly moored at a moor-

ing place of the channel or fairway, she has no burden of proof, or no presumption of fault arising against her, but that when a vessel is properly moored in such manner the presumption of fault arises on the part of the moving ship, and the burden of proof is on such moving vessel to exonerate herself from liability.

SIXTH POINT.

Had the Butte Been at Fault in Not Bearing a Light on the Occasion in Question This Fact Should Not Render Her Guilty of Joint Fault or Sole Fault and Subject to Liability Therefor as it Could Not Have Contributed to the Collision Under the Conditions Existing at the Time.

The respondent adopts by reference the argument and authorities under the first five points therein.

The petitioner has pointed out at page 25 of his brief that the Supreme Court of the United States in the *Pennsylvania,* 18 U. S. (19 Wall.) 25, that where a vessel is guilty of statutory fault, in order to exonerate herself from liability, she carries the burden of showing that such fault not only did not cause or contribute to the collision, but that it could not have done so. Assuming that the holding in the *Pennsylvania, supra,* is sound law, and that the same is the law of the land, which fact must be conceded from the many times it has been followed and cited by our highest tribunal, it would appear that the holding of this case jeopardizes the position of the petitioner herein to a greater extent than it does the respondent,

even had the BUTTE been in the fairway or channel. The record conclusively shows that the Court of Appeals had held that fault lay with the DORIS DEAN in operating on a hazy night, far out of the channel and on her own port side of the river near the bank in unsafe water in violation of Article 25 of the Inland and International Rules heretofore quoted, and that she failed to have a proper lookout required by Rule 26 of the Pilot Rules for Red River of the North and Rivers Emptying into Gulf of Mexico and their tributaries. The violation of these two statutory rules by the petitioner on the occasion in question, undoubtedly must have been before the Court of Appeals when it reached its decision. That Court in effect held that because of such violation and the manner of such violation the DORIS DEAN could not exonerate herself from fault and she did not meet the burden arising against her when violating a statutory fault under the *Pennsylvania* holding.

SEVENTH POINT.

Had the Butte Been at Fault in Not Bearing a Light on the Occasion in Question, This Fact Should Not Render Her Guilty of Joint Fault or Sole Fault and Subject Her to Liability Therefor as it was Superseded by the Cardinal Fault of the Doris Dean in Violating the Rule to Keep to Her Own Starboard Side of the Channel or Fairway, Supported by Presumption of Fault on the Part of the Moving Ship While Proceeding Through a Mooring Ground.

Respondent adopts by reference the argument and authorities under Point One to Five heretofore.

The authorities holding that there is no duty on the part of a vessel properly moored or anchored out of a channel or fairway to have a light during the nighttime, have already been cited, and it has been moreover pointed out that there is a burden of proof on a vessel anchoring or mooring in a channel or fairway to show freedom from fault, and it has likewise been pointed that no such burden exists on the part of the anchored or moored vessel if she is out of the channel or fairway, but that the same shifts to the moving vessel.

In the case of the *Degama*, 150 Fed. 323, 80 C. C. A. 93, the Court held:

> "When a vessel in motion runs into a vessel moored, the rule is that the moving vessel must exonerate herself from blame. The Virginia Ehrman and the Agnese, 97 U. S. 309-315, 24 L. Ed. 890, and cases cited. In such a case there is a presumption of fault on the part of the moving ship, and the burden of proof is on her to exonerate herself from liability. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Granite State, 3 Wall. 310, 314, 18 L. Ed. 179; Inland and Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Pennsylvania R. Co. vs. Ropner, (C. C.) 105 Fed. 397; The Bridgeport, 14 Wall. 116, 20 L. Ed. 787."

In applying the rules of navigation controlling the situation as it existed at the point and time of collision involved in this cause, in addition to considering the various

rules cited and the excerpt from the record as to the controlling facts, there should be added thereto one additional element.

That fact is that the terminal guard at the Haymark Terminal on the night of the collision, the only disinterested witness called in the whole case, has testified that had there been a light or lights on the barge BUTTE or the other barge moored below it on the night in question that he doubts whether or not the lights could have been seen due to the condition of fog which existed (R. 75-76). Even conceding that the BUTTE had been in the channel or fairway and not moored against the bank below the terminal at a proper place, then under this testimony of the only disinterested witness called, the question of the BUTTE'S liability for not having a light or lights thereon becomes moot.

CONCLUSION.

The DORIS DEAN on the occasion in question was guilty of three fundamental violations of the Pilot Rules and good navigational practice in that she failed to keep to her own starboard side of the channel or waterway, failed to have a proper lookout, failed to be able to stop within one-half of the visibility or the visibility she had on the occasion in question, and in addition thereto, she was at fault in committing these violations out of the fairway or channel and up against her port bank in a common

mooring place immediately below a well known and established dock. Furthermore, by reason of those faults, she was charged with the burden, particularly as the moving vessel, of exonerating herself from fault in the committing of these violations, and she has failed to meet this burden. The BUTTE was moored to the bank, a great distance from the channel, and with her outshore side on the very edge of water deep enough to float a light tug, and further she was moored well within the pier head line of the terminal upstream above her and in a common mooring ground. The collision was solely and fundamentally the fault of the DORIS DEAN and by reason of this fact she should bear the loss to the BUTTE as well as her own, and

It is therefore, respectfully submitted that it is not a proper case for review by certiorari in this court, and that the petition for the writ of certiorari should be denied.

Dated August ....., 1943.

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